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Nos. 85-785 and 85-800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-785

RIVERROAD ALLIANCE, INC., *et al.*,
Petitioners,

vs.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, *et al.*,
Respondents.

No. 85-800

PEOPLE OF THE STATE OF ILLINOIS,
Petitioners,

vs.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, *et al.*,
Respondents.

BEST AVAILABLE COPY

BRIEF OF RESPONDENT NATIONAL MARINE SERVICE INCORPORATED IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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* These statutory provisions and regulations are set forth in the Appendix filed in Case No. 85-800 at App. 71, 72 and 73-74 respectively.

+ These statutory provisions and regulations are affixed to this brief in a Supplemental Appendix, which will be referred to as "Supp.App." The provisions and regulations may be found at Supp.App. A-12 - A-18.

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BRIEF OF RESPONDENT NATIONAL MARINE SERVICE INCORPORATED IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INTRODUCTION

Respondent National Marine Service Incorporated ("National Marine") will respond in this brief to two petitions for certiorari arising from the decision of the United States Court of Appeals for the Seventh Circuit in *River Road Alliance, Inc. et al. v. Corps of Engineers of United States Army, et al.* reported

at 764 F.2d 445 (7th Cir. 1985). (App. 1-25).[1] These are *River Road Alliance, Inc. et al. v. Corps of Engineers, etc.*, No. 85-785 and *People of the State of Illinois v. Corps of Engineers, et al.*, No. 85-800. This joint brief is prepared in the interest of judicial economy and brevity.

STATEMENT OF THE CASE

Petitioners River Road Alliance, Inc. et al. ("River Road") and People of the State of Illinois ("Illinois") have failed to provide statements of the case that are complete, accurate, supported by the record or made without comment or argument. National Marine, due to the limited nature of this brief, will not provide a full statement of the case, but will, instead, correct and supplement the content of petitioners' statements of the case.

Facts Regarding the Alton Pool of the Mississippi River.

River Road (R.R. 3-12)[2] makes factual assertions regarding the Alton pool (or Alton Lake) of the Mississippi River which are not supported by the record. Acknowledging this deficiency, River Road (R.R. 4, fn.2) claims that these facts are contained in a "sworn complaint, not contravened by any counter-affidavit." This is inaccurate. River Road's First Amended Complaint (D.E. I 11)[3] is not verified. Further, National Marine (D.E. I 16) and the Corps of Engineers (D.E. I 25) denied most of River Road's allegations and moved to strike the remaining allegations (D.E. I 12, 23).

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[1] National Marine will refer to the Appendix filed in Case No. 85-800 as "App. ____."

[2] National Marine will refer to River Road's Petition for Writ of Certiorari as "R.R. ____."

[3] National Marine will refer to the District Court docket file for the River Road case (No. 82-5285) as "D.E. I ____," and the Illinois file (No. 83-5071) as "D.E. II ____."

Further, petitioners would have this Court believe that the segment of the Mississippi River in question was a pristine wildlife and recreational area free of river commerce. (R.R. 2-5; Ill. 4-5).[4] The record does not support this claim. The Seventh Circuit held:

> The State of Illinois, as appellee, acknowledges that Alton Lake "undergoes heavy barge traffic"; as many as 300 barges pass through it in a day. But the shores of the scenic portion are free from commercial development, except that National Marine Service has a shipyard, with until recently a fleeting facility attached, a half mile north of the proposed site. National Marine Service had leased that fleeting facility from the Illinois Department of Transportation, which cancelled the lease during the lawsuit. (App. 2; *see also* App. 10).

Petitioners' contentions about the potential threat to the Great River Road from the permitted activity (River Road 5-7; Ill. 4-5) are seriously undermined because Illinois itself leased property adjacent to the site in question to National Marine for the very same purpose — barge fleeting. (App. 2).

The Proposed Permitted Activity.

The application to the Corps of Engineers was for a permit[5] authorizing National Marine to install three anchors, mooring buoys and anchor chain and to fleet a maximum of 30 barges (six wide and five long) on the Illinois bank of the Mississippi River. (Vol. I, p. 1-2).[6] The proposed site is located just

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[4] National Marine will refer to Illinois' Petition for Writ of Certiorari as "Ill. ____."

[5] The Corps of Engineers' permission is required for the proposed fleeting activity pursuant to the River and Harbors Act of 1899, §10, 33 U.S.C. §403 (1982).

[6] National Marine will refer to the administrative record filed by the Corps of Engineers by volume and page as "Vol. ____, p. ____."

downriver from National Marine's shipyard and barge repair facility at Grafton, Illinois. (Riverway Statement, p. 1).[1]

The proposed activity would, at a maximum, encompass approximately 1,500 feet of: (1) the 256 miles of shoreline in the Alton pool and (2) the seven-mile scenic stretch for which petitioners express concern. (App. 2). The proposed fleeting area would not involve any permanent improvements and would be temporary. Upon termination of the permit, in approximately 1988, the facilities will be removed without leaving any damage to the scenic properties of the area. (App. 2, 10; Riverway Statement, p. 1; Vol. II, p. 21).

National Marine's purpose in applying for the permit was two-fold. First, it intended to use the area to fleet barges before and after repair at its adjacent shipyard. Second, the fleet site would alleviate some of the congested river traffic resulting from the existing Lock and Dam No. 26 and construction of the new Lock and Dam No. 26 at Alton, Illinois. (Riverway Statement, p. 2-4, 17).

The Corps of Engineers Environmental Evaluation of the Proposed Permitted Activity.

The Corps of Engineers solicited comments on the application from interested parties including federal, state and local governmental agencies, environmental groups, river-related interests and others affected by the proposal. A public hearing was conducted in the area on December 18, 1980. (Vol. I, Ex. 9, pp. 3-8). At the hearing, 76 individuals spoke, representing various interests. (App. 9, 46; Vol. I, Ex. 21; Vol. II generally). In addition, the Corps of Engineers received and reviewed hundreds of written submissions. (App. 9, 46-47; Vol. I, Ex. 20, 22, 24).

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[1] The "Riverway Statement" refers to a portion of the administrative record, as supplemented by the District Court on June 15, 1984.

The Mayor and City Council of Grafton, Illinois (Vol. III, pp. 82-83) and the Jersey County Board (Vol. III, p. 72), where the proposed activity was located, supported issuance of the permit. The Illinois Department of Conservation Historic Preservation Office concluded that the project would have no effect on historic, architectural or archeological sites in the area, including the villages of Chatauqua and Elsah. (Vol. I, Ex. 7, p. 10). The Illinois Environmental Protection Agency concluded the proposed activity would not cause water pollution (Vol. I, Ex. 8, pp. 11-12) and the Coast Guard found no threat to navigational safety (Vol. II, pp. 23-24). Illinois Senator Charles Percy and Congressman Paul Findley recommended approval of the permit. (Vol. I, Ex. 68, pp. 329-31).

The Illinois Department of Conservation ("IDOC") and the U.S. Department of Interior, Fish and Wildlife Service ("USFWS") informed the Corps of Engineers of the possible existence of a mussel bed in the vicinity of the proposed site. (Vol. I, Exs. 15, 16, 17, 18, 29 and 30). In response to this, National Marine hired a consultant to conduct a mussel survey to identify the location of any such mussel bed. (Vol. III, p. 69). The study was completed and circulated to IDOC and USFWS in September 1981. (Vol. I, Ex. 32, pp. 164-204; Ex. 33, p. 205; Ex. 34, p. 206). The study concluded that: (1) no federally listed endangered species were identified in the area (Vol. I, Ex. 32, pp. 186, 189), (2) the mussel bed did not extend upriver from Mile 217.1 (2/10 of a mile downriver from the proposed fleet site) (Vol. I, Ex. 32, p. 181) and (3) fleeting activity at the proposed site would not increase the already existing impact on the mussel bed caused by commercial harvesting, pollution and passing tows. (Vol. I, Ex. 32, pp. 186-87).

The Corps of Engineers issued its Environmental Assessment ("EA") on October 30, 1981, accompanied by a Finding of No Significant Impact ("FONSI") in which it concluded that the permit "subject to proposed limitations and special conditions," would not so significantly affect any facet of the

human environment as to require preparation of an Environmental Impact Statement ("EIS"). (App. 38-42).

On May 12, 1982, the Corps of Engineers met further with IDOC and USFWS to discuss the mussels. As a result of the meeting, IDOC submitted a monitoring proposal, which was estimated to cost $200,000. (Vol. I, Ex. 56, pp. 241-46). Each agency searched for funds for the proposal; none were available. The Corps of Engineers concluded that it was unreasonable to require National Marine to fund an "ambitious" study of such magnitude, but stated it would require National Marine to conduct a follow-up mussel survey. In light of the failure to fund the monitoring program, IDOC and USFWS chose to oppose the entire project instead of exploring further any resolution of the issue. (Vol. I, Ex. 57, p. 247).

As part of its submission to the Corps of Engineers, National Marine (actually Riverway, its predecessor in interest) provided information regarding its exploration of alternatives. (Riverway Statement, pp. 6-8). The Illinois River and the Missouri bank of the Mississippi River were found to be unsuitable for fleeting. A consultant's study was submitted (Riverway Statement, Ex. B) and concluded that no alternative site was available that: (1) met the physical requirements for fleeting, (2) was reasonably close to the Grafton shipyard, and (3) provided the possibility of acquiring sufficient riparian interests for fleeting use. Neither petitioners nor any other interested party provided any information to the Corps of Engineers about any other site that met the necessary criteria. (App. 13). The Corps of Engineers concluded that, while other sites could be found, the proposed site offered advantages over any alternative site. (App. 58).

The Corps of Engineers issued its Findings of Fact (App. 43-67) on June 15, 1982. This document summarized its investigation, assessment and conclusions regarding the permit application. On September 15, 1982, Assistant Secretary of the Army William R. Gianelli denied elevated review of the matter. (App. 68-70).

The Issuance of the Permit to National Marine.

On October 5, 1982,[8] the Corps of Engineers issued the permit containing several special conditions.[9] Special Condition 2n required National Marine to discontinue use of the permitted site after notification of completion of the new Lock and Dam No. 26. Special Conditions 2a and 2b related to monitoring and protection of the downriver mussel bed. Special Condition 2j prohibited mooring of barges with cargoes of gasoline, petroleum products, chemicals or similar products. Special Condition 2l prohibited permanent mooring of work barges, anchor barges, fleet barges, derelicts or sunken vessels at the site. Special Condition 2m required minimization of light and noise pollution by search lights, bullhorns and machinery at the site.

The facility went into operation in October 1982 at 30 to 40 percent capacity (9-12 barges) until the district court enjoined it on April 30, 1984. (App. 4).

SUMMARY OF ARGUMENT

I. The result in this case will be the same regardless of which standard of review is applied. The proposed activity, as the Corps of Engineers found in accordance with controlling statutes and regulations, is not of sufficient magnitude to require further environmental scrutiny.

II. The Corps of Engineers complied with the National Environmental Policy Act of 1969, ("NEPA"), §102, 42 U.S.C. §4332 (1976) by independently evaluating a site analysis by National Marine that justified the proposed

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[8] On September 22, 1982, the District Court entered a temporary restraining order against issuance of the permit. The TRO expired on its own terms on September 27, 1982.

[9] For unknown reasons, petitioners failed to include the permit in their Appendix. The permit with its special conditions may be found at Supp.App. A-6 - A-9.

site. The Corps of Engineers received no contradictory information regarding alternative sites, and discharged its legal duties under the permit procedure.

III. The Seventh Circuit did not establish a cost/benefit analysis as a new prerequisite to the decision whether to prepare an EIS. The Circuit Court accepted the Corps of Engineers' finding that an EIS was not required because the proposed action would not have a sufficiently "significant" impact on the environment. The Seventh Circuit merely acknowledged the present state of the law and the trend towards limiting the use of an EIS to activities with truly significant impacts on the environment.

IV. The Seventh Circuit did not substitute its judgment for that of the Corps of Engineers. Instead, it affirmed the Corps of Engineers' decision. Furthermore, the Seventh Circuit owed no deference to the District Court in reviewing the agency record.

ARGUMENT

There is nothing about this case that warrants review by this Court.

I.

This Case Would Be Affirmed Regardless Of Which Standard Of Review Is Applied.

Petitioners assert that this Court should grant certiorari to review the split in the circuits regarding the appropriate standard of judicial review to apply to a federal agency's decision not to prepare an EIS. Petitioners argue, as they must, that application of a different standard than that used by the Seventh Circuit would change the outcome of the judicial review. However, the Seventh Circuit squarely addressed this matter and concluded that, regardless of which standard was applied, the result would be the same. (App. 6-7).[10]

This Court will readily see that the permitted activity in this case is not of such magnitude as to require an EIS. Therefore, as the Seventh Circuit concluded, whether judicial review of the Corps of Engineers' determination is "plenary" or "deferential" is inconsequential. The permitted activity is of extremely limited scope measured by space, time and permanent impact. It involves utilization of a miniscule portion of the Mississippi River and the Alton pool. It is temporary and will expire in approximately 1988. Upon expiration, all facilities will be removed from the area.

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[10] In light of this conclusion, this case is distinguishable from the situation in *Gee v. Boyd*, ____ U.S. ____, 105 S.Ct. 2123 (1985), in which three justices of this Court dissented to the denial of a writ of certiorari. In *Gee*, the appellate court gave no indication whether it would have decided the case differently under a "reasonableness" standard of review.

The two most significant impacts claimed by petitioners are aesthetic considerations and aquatic life. The Corps of Engineers properly concluded that the impact on any aesthetic concerns was sufficiently subjective and the impact on aquatic life was sufficiently speculative to eliminate the need for further scrutiny. Moreover, the temporary nature of the permitted activity means that any such concerns will be removed in a relatively short period.

Petitioners further urge this Court to adopt a standard by which an environmental plaintiff can, by merely alleging that a project *may* significantly degrade *some* environmental factor, force the Corps of Engineers to make one of two choices: (1) either conclude that the project will have "absolutely no effect" that would significantly degrade *any* environmental factor or, (2) failing to meet that stringent standard, prepare an EIS. (Ill. p. 13-14). Adoption of this argument would most assuredly require preparation of an EIS for virtually every proposed action. Environmental plaintiffs will have no problem making such *allegations* and federal agencies will rarely, if ever, be able to meet petitioners' proposed conclusion.

Petitioners' proposal is contrary to the trend of reducing the number of projects that require an EIS to those with truly significant impacts on the environment. (App. 9-10). The Seventh Circuit's decision is consistent with this judicial trend and need not be reviewed further by this Court.

II.

The Corps Of Engineers Complied With NEPA Section 102(2)(E) Regarding Alternatives.

Petitioners dramatically claim that the Seventh Circuit decision regarding the agency's duties under Section 102(2)(E) of NEPA "produce a question of first impression and national importance" (Ill. p. 18) and that the decision has "judicially

repealed" this section of NEPA. (Ill. p. 22). This Court should conclude that these claims are exaggerated and without basis.

NEPA requires that agencies "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." §102(2)(E), 42 U.S.C. §4332(2)(E) (App. 72). Petitioners focus on the agency's duty to study, develop and describe alternatives, but ignore the remainder of the statute and fail to identify any unresolved conflict concerning alternative uses of the available resources. As petitioners state, Congress' intention in enacting §102(2) (E) was to ensure that no federal projects were undertaken without consideration of more ecologically sound courses of action and that the agency decision-maker had before him all possible approaches to a particular project. (Ill. p. 19).

The Corps of Engineers' findings of fact make it apparent that alternatives were considered. The Corps had before it a study by National Marine regarding its exploration of alternatives. (App. 57). The district engineer found that there were alternative fleeting sites, but he also found that the "Grafton site offers advantages over any alternative sites in terms of operation efficiencies and reduced fuel consumption . . . ." (App. 58). The Corps' use of National Marine's study on alternative sites is not a violation of NEPA. *Save Our Wetlands, Inc. v. Sands,* 711 F.2d 634, 643 (5th Cir. 1983). In fact, Council on Environmental Quality ("CEQ") regulations specifically allow an agency to permit an applicant to prepare an *entire* Environmental Assessment so long as the agency makes its own evaluation of the environmental issues and takes responsibility for the scope and content of the assessment. 40 C.F.R. §1506.5(b) (App. 73-74). That is precisely what the Corps of Engineers did in this case. No interested party, including petitioners, suggested any other comparable site. The Corps of Engineers' determination was not rebutted. There were no "unresolved conflicts concerning alternative uses of available resources."

Moreover, the scope of alternatives to be considered is narrower where the agency has determined, as here, that the proposed action will not significantly affect the environment. *City of New York v. United States Department of Transportation,* 715 F.2d 732, 741-45 (2d Cir. 1983), *cert. denied* 104 S.Ct. 1403 (1984). Further, the Corps of Engineers' consideration of alternatives will be upheld even where other possible alternatives may exist. *Save Our Wetlands, Inc. v. Sands,* 711 F.2d 634, 645 (5th Cir. 1983). And this Court, in *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.,* 435 U.S. 519, 553-55 (1978), said that a challenging party must alert the agency in an administrative hearing to its contentions in specific and focused language and not in "cryptic and obscure reference to matters that 'ought to be considered' " when dealing with omitted alternatives. In that light, the Seventh Circuit was clearly correct in stating that:

> The Corps was entitled not to conduct a further study of alternatives unless the plaintiffs were prepared to shoulder the burden of showing that National Marine had overlooked some plausible alternative site — and they were not. The Corps is not a business consulting firm. It is in no position to conduct a feasibility study of alternative sites on the Mississippi for a barge fleeting facility, a study that would have to both evaluate National Marine Services' business needs and determine the availability of the necessary permissions from the owners of riparian land at the various sites. The Corps has to depend on the parties for such information, and National Marine Service's submission was unrebutted.

(App. 13).

III.

The Seventh Circuit Did Not Establish A New Prerequisite To The Preparation Of An Environmental Impact Statement.

Petitioner River Road claims that the Seventh Circuit devitalized NEPA by judicially imposing a new requirement to excuse an agency's obligation to otherwise prepare an EIS (River Road p. 37-45). Specifically, it erroneously claims that the Seventh Circuit held that a reviewing court should look to whether the time and expense of an EIS are commensurate with the likely benefits of a more reaching evaluation.

This argument makes no sense because it suggests that the Seventh Circuit initially held that an EIS should be prepared and then excused its preparation on a cost/benefit basis. In fact, the Seventh Circuit affirmed the Corps of Engineers' determination that the proposed activity did not require an EIS. Instead of creating a new prerequisite to an EIS, as petitioner River Road maintains, the Seventh Circuit Court merely paraphrased a balancing process already used by the Corps of Engineers and authorized in regulations promulgated by it and the CEQ.

The CEQ has expressed its awareness of the tension between costs and benefits. In 40 C.F.R. §1500.4(q) (Supp.App. A-15), it requires agencies to reduce excessive paper work by "using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an Environmental Impact Statement."

Congress and the CEQ left it to the individual agencies to determine whether an EIS was necessary for a proposed action. Section 102(2)(B) of NEPA, 42 U.S.C. §4332(2)(B), (App. 71), states that a federal agency shall "identify and develop methods and procedures, in consultation with the Council on En-

vironmental Quality" to ensure "presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations." CEQ regulation 40 C.F.R. §1501.4(a) (Supp.App. A-15 - A-16) provides that the agency shall determine "under its procedures" whether or not a proposal fits into a category requiring an EIS. If a proposal does, then the determination whether to prepare an EIS is to be based "on the Environmental Assessment." 40 C.F.R. §1501.4(c) (Supp.App. A- 16). In accordance with these mandates, the Corps of Engineers' developed lists of activities that normally require an EIS (33 C.F.R. §230.6; Supp.App. A-12 - A-14) and those that require an EA, but not necessarily an EIS (33 C.F.R. §230.7; Supp.App. A-14). Included in the latter are regulatory permits, for which the Corps has issued general policies:

> (1) The decision whether to issue a permit will be based on an evaluation of the probable impact including cumulative impacts of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a *careful weighing* of all those factors which become relevant in each particular case. The *benefits* which reasonably may be expected to accrue from the proposal *must be balanced* against its reasonable foreseeable *detriments*. The *decision* whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are *therefore determined by the outcome of the general balancing process*. * * * (Emphasis added).

33 C.F.R. §320.4(a)(1) (Supp. App. A-14 - A-15).

Similarly, the decision whether to engage in an EIS is one of judgment that requires the careful weighing of various factors enumerated by the CEQ in its definition of "significantly" at 40 C.F.R. §1508.27(b) (Supp.App. A-16 - A-18). The CEQ also recognized that a balancing of factors was necessary. It pointed out that the "significance of an action must be analyzed in

several contexts" and that it would vary "with the setting." 40 C.F.R. §1508.27(a) (Supp.App. A-16). It implicitly demanded a balancing process by listing 10 factors to be considered in evaluating the intensity of an impact.

The Corps of Engineers, in reaching the conclusion that an EIS was not required, adhered to the above-described regulatory requirements. The Seventh Circuit affirmed that the Corps of Engineers acted within its authority in reaching the conclusion. Nowhere in this process did the Seventh Circuit judicially impose any new requirement.

IV.

The Seventh Circuit Affirmed The Findings Of The Corps Of Engineers And Did Not Substitute Its Own Judgment For That Of The Agency.

Petitioner River Road argues that the Seventh Circuit substituted its judgment for that of the Corps of Engineers regarding whether to prepare an EIS. (River Road pp. 22-37). This claim is puzzling in that the Seventh Circuit *affirmed* the Corps of Engineers' determination that an EIS was not necessary.

The limited scope of judicial review of agency actions involving assessment of environmental concerns under NEPA is well settled. See *Strycker's Bay Neighborhood Council, Inc. v. Karlan,* 444 U.S. 223, 227-28 (1980) and cases cited therein; and *Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.,* 462 U.S. 87 (1983). The Seventh Circuit expressly acknowledged this standard and adhered to it:

> "The nature of the required judgment explains why we have held that an agency's decision not to prepare an environmental impact statement will be set aside only if it is an abuse of discretion."

(App. 6);

> "It is not whether we, if we were the Army Corps of Engineers, would have denied the permit. It is whether the Corps exceeded the bounds of its decision-making authority in concluding that the fleeting facility would not have so significant an impact on the environment as to require a more elaborate study of environmental consequences.

(App. 7);

> "Whether an evironmental impact statement was required in this case was a 'sufficiently close question to prevent us from substituting our judgment for the Corps.' "

(App. 10).

River Road mistakenly relies on the District Court opinion and erroneously asserts that the Seventh Circuit should have given some deference to its findings. (River Road pp. 26-29). River Road's misplaced argument is that the District Court opinion is amply supported by the record, and River Road criticizes the Seventh Circuit for declining to review the District Court findings.

The summary judgment entered by the District Court was based on the administrative record of the agency. Accordingly, the Seventh Circuit was authorized to make an independent review of the agency determination without according any deference to the District Court. *Camp v. Pitts,* 411 U.S. 138, 142 (1973); *Louisiana Environmental Society, Inc. v. Dole,* 707 F.2d 116, 119 (5th Cir. 1983); and *Brown v. United States Department of Interior,* 679 F.2d 747, 748-49 (8th Cir. 1982). This is particularly true where, as here, petitioners' counsel prepared the decision for the District Court's signature. (App. 4). *CECO Corp. v. Bliss & Laughlin Industries, Inc.,* 557 F.2d 687, 689 (9th Cir. 1977).

River Road cites several specific examples purportedly supporting its claim. It is not necessary to review them in detail because River Road's basic contention is misplaced. However,

it is noted that these specific examples pertain to arguments petitioners made elsewhere or concern matters of lesser significance that do not affect the outcome of this matter.

CONCLUSION

This Court should deny the petitions of River Road and Illinois for writs of certiorari.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX

THE PERMIT

Application No. P-07V OX 1 001425

Name of Applicant National Marine Service, Inc.

Effective Date 5 October 1982

Expiration Date (If applicable) 31 December 1985

DEPARTMENT OF THE ARMY
PERMIT

Referring to written request dated 21 August 1980 for a permit to:

(X) Perform work in or affecting navigable waters of the United States, upon the recommendation of the Chief of Engineers, pursuant to Section 10 of the Rivers and Harbors Act of March 3, 1899 (33 U.S.C. 403):

National Marine Service, Inc.
1750 Brentwood Boulevard
Brentwood, Missouri 63144

is hereby authorized by the Secretary of the Army:

to construct, operate and maintain a barge fleeting facility along the left bank of the Mississippi River, approximately mile 217.3, Upper Mississippi River near Grafton, Illinois

in accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit (on drawings give file number or other definite identification marks.)

entitled "Proposed Fleeting Area by Riverway Towing Company in Mississippi River at mile 217.3 near Grafton, County of Jersey, State of Illinois," dated 21 August 1980 in one sheet

Subject to the following conditions:

1. General Conditions:

a. That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit, and that any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension or revocation of this permit, in whole or in part, as set forth more specifically in General Conditions j or k hereto, and in the institution of such legal proceedings as the United States Government may consider appropriate, whether or not this permit has been previously modified, suspended or revoked in whole or in part.

b. That all activities authorized here, shall, if they involve, during their construction or operation, any discharge of pollutants into waters of the United States or ocean waters, be at all times consistent with applicable water quality standards, effluent limitations and standards of performance, prohibition, pretreatment standards and management practices established pursuant to the Federal Water Pollution Control Act of 1972 (P.L. 92.500 86 Stat. 816) the Marine Protection, Research and Sanctuaries Act of 1972 (P.L. 92.532, 86 Stat. 1052) or pursuant to applicable State and local law.

c. That when the activity authorized herein involves a discharge during its construction or operation of any pollutant including dredged or fill material, into waters of the United States, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 6 months of the effective date of any revision or modification of water quality standards, or as directed by an implementation plan contained in such revised or modified standards, or with such longer period of time as the District Engineer, in consultation with the Regional Administrator of the Enviornmental Protection Agency, may determine to be reasonable under the circumstances.

d. That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species.

e. That the permitee agrees to make every reasonable effort to prosecute the construction or operation of the work authorized herein in a manner so as to minimize any adverse impact on fish, wildlife, and natural environmental values.

f. That the permitee agrees that he will prosecute the construction or work authorized herein in a manner so as to minimize any degradation of water quality.

g. That the permittee shall permit the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

h. That the permitee shall maintain the structure or work authorized herein in good condition and in accordance with the plans and drawings attached hereto.

i. That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges, and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations nor does it obviate the requirement to obtain State or local assent required by law for the activity authorized herein

j. That this permit may be summarily suspended, in whole or in part, upon a finding by the District Engineer that immediate suspension of the activity authorized herein would be in the general public interest. Such suspension shall be effective upon receipt by the permittee of a written notice thereof which shall indicate (1) the extent of the suspension, (2) the reasons for this action, and (3) any corrective or preventative measures to be taken by the permittee which are deemed necessary by the District Engineer to abate imminent hazards to the general

public interest. The permittee shall take immediate action to comply with the provisions of this notice. Within ten days following receipt of this notice of suspension, the permittee may request a hearing in order to present information relevant to a decision as to whether his permit should be reinstated, modified or revoked. If a hearing is requested, it shall be conducted pursuant to procedures prescribed by the Chief of Engineers. After completion of the hearing, or within a reasonable time after issuance of the suspension notice to the permittee if no hearing is requested, the permit will either be reinstated, modified or revoked.

k. That this permit may be either modified, suspended or revoked in whole or in part if the Secretary of the Army or his authorized representative determines that there has been a violation of any of the terms or conditions of this permit or that such action would otherwise be in the public interest. Any such modification, suspension, or revocation shall become effective 30 days after receipt by the permittee of written notice of such action which shall specify the facts or conduct warranting same unless (1) within the 30-day period the permittee is able to satisfactorily demonstrate that (a) the alleged violation of the terms and the conditions of this permit did not, in fact, occur or (b) the alleged violation was accidental, and the permittee has been operating in compliance with the terms and conditions of the permit and is able to provide satisfactory assurances that future operation shall be in full compliance with the terms and conditions of this permit, or (2) within the aforesaid 30-day period, the permittee requests that a public hearing be held to present oral and written evidence concerning the proposed modification, suspension or revocation. The conduct of this hearing and the procedures for making a final decision either to modify, suspend or revoke this permit in whole or in part shall be pursuant to procedures prescribed by the Chief of Engineers.

l. That in issuing this permit, the Government has relied on the information and data which the permittee has provided in

connection with this permit application. If, subsequent to the issuance of this permit, such information and data prove to be false, incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Government may, in addition, institute appropriate legal proceedings.

m. That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

n. That the permittee shall notify the District Engineer at what time the activity authorized herein will be commenced, as far in advance of the time of commencement as the District Engineer may specify, and of any suspension of work, if for a period of more than one week, resumption of work and its completion.

o. That if the activity authorized herein is not completed on or before the 31st day of December, 1985 (three years from the date of issuance of this permit unless otherwise specified) this permit is not previously revoked or specifically extended, shall automatically expire.

p. That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may require authorization by the Congress or other agencies of the Federal Government.

q. That if and when the permittee desires to abandon the activity authorized herein, unless such abandonment is part of a transfer procedure by which the permittee is transferring his interests herein to a third party pursuant to General Condition t hereof, he must restore the area to a condition satisfactory to the District Engineer.

r. That if the recording of this permit is possible under applicable State or local law, the permittee shall take such action as may be necessary to record this permit with the Register of Deeds or other appropriate official charged with the respon-

sibility for maintaining records of title to and interests in real property.

s. That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

t. That this permit may not be transferred to a third party without prior written notice to the District Engineer, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit in the space provided below and thereby agreeing to comply with all terms and conditions of this permit. In addition, if the permittee transfers the interests authorized by conveyance of realty, the deed shall reference this permit and the terms and conditions specified herein and this permit shall be recorded along with the deed with the Register of Deeds or other appropriate official.

II. **Special Conditions:** (Here list conditions relating specifically to the proposed structure or work authorized by this permit)

2a. That at the end of the second year of operation, and continuing for such additional years as may be prescribed by the District Engineer, permittee shall provide information concerning fleeting operations and mussel bed productivity as follows:

- Within 30 days following the anniversary date of this permit, submit a report to the District Engineer indicating number of barges fleeted during the year, by date, and report number of days fleet was serviced by push boats.

- On or before the second anniversary date of this permit, submit a report to the District Engineer indicating the size, location, population density and distribution, and species composition of an adjacent mussel bed, based on a survey performed during any of the summer months immediately preceding the anniversary date. Insofar as possible, your survey should

duplicate those survey and classification procedures that were reported in a pre-operational mussel survey submitted to the District Engineer on 15 September 1981.

2b. That permittee hereby acknowledges notification that evidence of significant damage to the existing mussel bed could result in suspension, modification or revocation of this permit.

2c. That permittee shall insure moored fleet is continuously maintained at or below the maximum size specified on the attached plans. Consistent with prevailing stage and channel conditions, fleet shall be reduced, including complete removal of all barges, if required, to provide free and easy passage for river traffic.

2d. That permittee, to the extent possible, shall prevent or remove accumulation of ice and drift.

2e. That permittee shall reduce fleet size, or take other actions that may be necessary to prevent failure of the anchoring system under any load conditions that may be imposed by flood, ice flows, storms or otherwise.

2f. That in the event permittee's anchoring system fails to hold the moored fleet in position, permittee shall promptly return the anchors and anchor barge to the position authorized by this permit. Permittee shall report such incidents to the District Engineer within 24 hours, and such reports shall include an account of measures taken or proposed by permittee to prevent future incidents.

2g. That permittee is authorized to install additional anchors, chain, or both, to proposed anchor barge, provided such additions do not adversely affect navigation. Plans for the work shall be submitted to the District Engineer for concurrence within 5 days following such installation.

2h. That permittee shall limit the mooring of empty barges, or take other actions that may be necessary to prevent channelward rotation of fleet under any and all conditions.

2i. That permittee shall temporarily remove the anchor barge and fleet, or temporarily reduce fleet, as may be necessary to minimize interference with channel maintenance dredging and disposal operations undertaken by the Corps of Engineers.

2j. That permittee shall not moor barges containing materials classified as hazardous by the US Coast Guard. These materials include but are not limited to gasoline, petroleum products, chemicals and similar products.

2k. That permittee shall not engage in major repair or maintenance operations, loading, unloading or transferring cargo except when required to prevent a barge from sinking.

2l. That permittee shall not permanently moor any work barges, anchor barges or fleet barges, derelicts or sunken vessels at the site.

2m. That permittee shall minimize flashing of search lights on the shore and shall avoid excessive noise from bullhorns and machinery.

2n. That permittee shall discontinue mooring of barges at facilities authorized by this permit following notification by the District Engineer that removal of the existing Lock and Dam No. 26 structures has progressed such that a safe and adequate bypass channel is available for barge traffic. Permittee shall vacate the site within 90 days of such notice and shall restore the area to the satisfaction of the District Engineer.

2o. That upon notification by the District Engineer that biological and/or water quality studies will be performed in the vicinity of permittee's fleeting facilities, permittee shall take measures to insure members of study team are afforded safe access to areas selected for sampling, monitoring, testing and/or similar activities.

The following Special Conditions may be applicable when appropriate

III. Structures In Or Affecting Navigable Waters Of The United States.

3a. That this permit does not authorize the interference with any existing or proposed Federal project and that the permitee shall not be entitled to compensation for damage or injury to the structures or work authorized herein which may be caused by or result from existing or future operations undertaken by the United States in the public interest.

3b. That no attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the activity authorized by this permit.

3c. That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.

3d. That the permittee, upon receipt of a notice of revocation of this permit or upon its expiration before completion of the authorized structure or work, shall, without expense to the United States and in such time and manner as the Secretary of the Army or his authorized representative may direct, restore the waterway to its former conditions. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

* * * * *

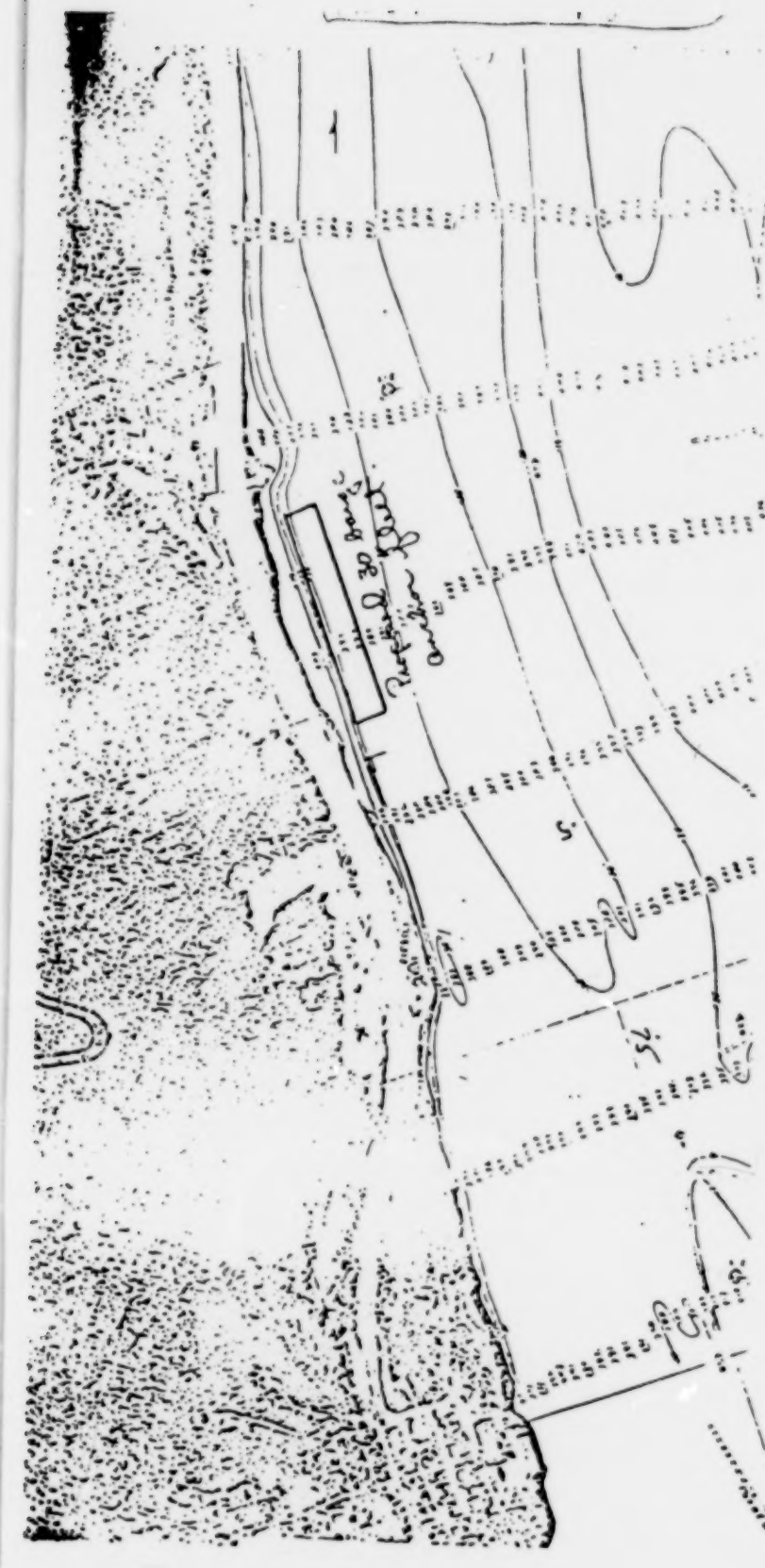
This permit shall become effective on the date of the District Engineer's signature.

Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

/s/ (President) September 30, 1982
Permittee Date

By Authority Of The Secretary Of The Army:

Gary D. Beech
Colonel, CE
District Engineer
U.S. Army Corps Of Engineers 5 October 1982
Date



STATUTES AND REGULATIONS INVOLVED

33 C.F.R. §230.6
Actions normally requiring an EIS.

Listed below are types of Corps of Engineers actions which normally require the preparation of an EIS, although in certain cases an EA may be adequate (see § 230.7).

(a) *Legislation.* A legislative EIS will be prepared to accompany a bill or legislative proposal to Congress recommended by or with significant cooperation and support of the Corps of Engineers (exclusive of appropriations) significantly affecting the quality of the human environment. A Legislative EIS shall be prepared to conform to the requirements of these regulations except as provided in 40 CFR 1506.8(b).

(b) *Feasibility studies.* Feasibility studies are planning actions conducted in accordance with the ER 1105-2-200 series of regulations. Studies resulting in recommendations by the reporting officer are documented in feasibility reports, which include Preauthorization Survey Reports, Post Authorization Advanced Engineering and Design (AE&D) Planning Reports, Significant Post Authorization Change (S-PAC) Reports and Detailed Project Reports (DPR). Where an EIS or EIS supplement is required it shall be integrated with the Main Report in the feasibility document and noted on the front cover as an Environmental Impact Statement. ER 1105-2-920 and Appendix A of these regulations provide guidance on the organization and content of reports and EIS for feasibility studies, respectively.

(1) *Survey studies.* Survey studies are undertaken in response to specific Congressional Resolutions or by an item in an Act and, if completed through Stage 3 planning, result in a Survey Report.

(2) *Post Authorization Advanced Engineering and Design (AE&D) Planning Report.* The Phase I GDM is the report which provides the affirmation or reformulation of an authorized project. The Phase II GDM is the report which presents the results of the detailed design and cost estimate studies. Under certain conditions the Phase I GDM may be combined with the Phase II GDM in a combined AE&D planning and design memorandum. Projects in this category will be reviewed to determine the adequacy of the final EIS on file at the time the project was authorized and what type of further NEPA documentation is required. Refer to §§ 230.10, 230.11(b) and Appendix C of this part for discussion on the use of an EA or EIS supplements.

(3) *Continuing authorities studies.* Continuing authorities studies are prepared under one of the following authorities for authorization by the Chief of Engineers or the Secretary of the Army;

Sec. 3, Flood Control Act of 1945 (Snagging and clearing for navigation)

Sec. 205, Flood Control Act of 1948 (Small flood control projects)

Sec. 208, Flood Control Act of 1954 (Snagging and clearing for flood control)

Sec. 107, River and Harbor Act of 1960 (Small navigation projects)

Sec. 103, River and Harbor Act of 1962 (Small Beach erosion projects)

Sec. 111, River and Harbor Act of 1968 (Mitigation for navigation shore damages)

Sec. 202, Water Resources Development Act of 1976 (Drift and debris removal — commercial harbors)

Such studies generally result in Detailed Project Reports (DPR) which serves as a general design memorandum and provides the basis for approval of a project for construction.

(c) *Projects in a construction status.* This category includes authorized projects or separable project features or units, or

major rehabilitation projects in a construction category. Actions in this category include the preparation of Feature Design Memorandum, Design Memorandum for Major Rehabilitation Projects, plans and specifications, and construction activities. Refer to § 230.11(b) and Appendix C for discussions on further NEPA documentation.

(d) *Operation and maintenance (O & M).* This category includes channel maintenance dredging and disposal activities, certain rehabilitation projects, the operation of dam and lake projects, lock and dam operations, aquatic plant control program and significant changes in the management of lands and project resources. Priority effort will be assigned to the preparation of an EIS for remaining O&M actions involving annually recurring dredging and disposal operations for which a final EIS has not been filed. A lesser priority effort will be assigned to any remaining O&M action on other completed projects.

33 C.F.R. § 230.7
Actions normally requiring an Environmental Assessment (EA) but not necessarily an EIS.

Listed below are types of Corps actions which require at least the preparation of an EA.

* * * * *

(e) *Regulatory permits.* See Appendix B.

33 C.F.R. § 320.4(a)
General Policies for evaluating permit applications.

The following policies shall be applicable to the review of all applications for Department of the Army permits. Additional policies specifically applicable to certain types of activities are identified in Parts 321-324.

(a) *Public interest review.* (1) The decision whether to issue a permit will be based on an evaluation of the probable impact in-

cluding cumulative impacts of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The beneift which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of the general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs and, in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in the public interest.

40 C.F.R. § 1500.4
Reducing paperwork.

Agencies shall reduce excessive paperwork by:

* * * * *

(q) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§ 1508.13).

40 C.F.R. § 1501.4
Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

* * * * *

40 C.F.R § 1508.27
Significantly

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may

make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.